In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1423

DONALD R. ELBEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of five counts of securities fraud (15 U.S.C. 77q(a)) and eight counts of mail fraud (18 U.S.C. 1341). He was sentenced to a total of fifteen years' imprisonment. The court of appeals affirmed with an extensive opinion. 364 F. 2d 127 (C.A. 10), certiorari denied, 385 U.S. 1014.

Petitioner subsequently filed a civil suit in which he sought to compel the United States to produce

numerous documents and other material from various agencies. He also filed a motion under 28 U.S.C. 2255 alleging twenty grounds for relief. The district court consolidated these matters and dismissed them without a hearing. The court of appeals affirmed (Pet. App. A).

In this Court petitioner contends that denial of the Section 2255 motion was erroneous because the trial judge had improperly instructed the jury that the investment certificates at issue were securities within the meaning of the pertinent statute; because he was improperly denied access to certain F.B.I. records and grand jury testimony; and because an affidavit of counsel, alleged to be newly discovered, shows that petitioner had followed counsel's advice in doing the criminal acts and thus lacked the requisite criminal intent. The court of appeals correctly held that such issues were not properly cognizable on collateral attack. See *Kaufman* v. *United States*, 394 U.S. 217.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

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